No. 76

# In the Supreme Court of the United States

OCTOBER TERM, 1945

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, AND W. ALEXANDER JULIAN, TREASURER OF THE UNITED STATES, PETITIONERS

*v.*

HARTWELL CABELL

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE PETITIONERS

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### OPINIONS BELOW

The opinion of the District Court (R. 9) has not been reported. The opinion of the Circuit Court of Appeals (R. 14) is reported in 148 F. 2d 737.

### JURISDICTION

The decision of the Circuit Court of Appeals was rendered on April 3, 1945, and judgment entered on May 2, 1945 (R. 17). Petition for writ of certiorari was filed on May 15, 1945, and granted on June 4, 1945 (R. 17). The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## STATEMENT

This suit was initiated on June 29, 1944, in the United States District Court for the Southern District of New York under the Trading with the Enemy Act, as amended, for the recovery from the Alien Property Custodian[1] of money claimed to be owed to the plaintiff by an Italian insurance company, of which the assets in this country had been vested by the Custodian. The amended complaint, filed on September 13, 1944, alleged the following facts:

In 1935, the Assicurazioni Generali di Trieste e Venezia, an Italian insurance company established a branch in the City of New York (R. 2). This branch, known as the General Insurance Company of Trieste and Venice, continued to operate here until July 25, 1941, when it was taken over by the New York Superintendent of Insurance in liquidation proceedings (R. 2–3).

Prior to the liquidation, the plaintiff had performed legal services both for the Italian com-

[1] The plaintiff also named the Treasurer of the United States as a defendant, apparently relying upon that portion of Section 9 (a) of the Trading with the Enemy Act which provides: "* * * to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant."

pany and its United States branch. He filed with the Superintendent of Insurance a claim for about $22,000, constituting fees and disbursements which had been approved but not paid by Assicurazioni (R. 3–4). The Superintendent allowed and paid all but $7,000 which he concluded was a debt due from the Italian company rather than its United States branch (R. 4). The disallowance of $7,000 was upheld by the New York Court of Appeals in February, 1944 (R. 4).

In 1942, the Alien Property Custodian issued orders vesting in himself for the benefit of the United States all properties in this country of the Italian company, including all of the properties of the United States branch, except so much of a reserve fund as would be necessary to pay "(1) claims of domestic creditors of such United States branch of said corporation which have been allowed and approved but not paid by said liquidator, (2) claims of domestic creditors of such United States branch of said corporation which are being held in suspense by said liquidator, and (3) liquidation expenses of said liquidator * * *." Vesting Order 218, October 7, 1942, 7 F. R. 9466; Vesting Order 468, December 9, 1942, 8 F. R. 1038 (R. 5). The vested assets were delivered to the Custodian.

The plaintiff filed his claim[2] with the Custodian, but was not paid.

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[2] Revising a previous estimate of disbursements, the plaintiff now claims $6,922.02 and interest.

The complaint, alleging the foregoing facts, was dismissed on motion of the defendants, the district court holding that the debt claim provisions of Section 9 (a) of the Trading with the Enemy Act, as amended, were deprived of general applicability by the amendments embodied in Section 9 (e); and that in view of the operative dates explicitly set forth in Section 9 (e), Congressional action is necessary to afford a remedy to creditors of property vested during the present war (R. 9–11). The circuit court of appeals reversed the judgment, holding that the general language of Section 9 (a) has a continuing vitality, apart from the limitations of Section 9 (e); and that the disqualifying dates introduced by Section 9 (e) apply only to property seized during the last war (R. 14–16).

## STATUTES INVOLVED

The pertinent provisions of Sections 5 and 9 of the Trading with the Enemy Act, as amended, are set forth in the Appendix, *infra*, pp. 25–28.

## QUESTION PRESENTED

Section 9 of the Trading with the Enemy Act, as originally enacted, authorized a creditor of the former owner of enemy property seized by the Alien Property Custodian to bring suit against the Custodian upon the debt. Section 9 (e) of the Act, as amended, provides that no debt shall be allowed "under this section unless it was

owing to and owned by the claimant prior to October 6, 1917" and claimed by application filed "prior to the date of the enactment of the Settlement of War Claims Act of 1928." Section 5 (b) of the Act, as amended by the First War Powers Act, 1941, provides that the President or his authorized agent may vest the property of any foreign country or national thereof and that such property may be "used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States."

The question is whether the Act, as amended, permits a creditor of the former owner of property vested during the present war to bring suit against the Custodian despite the temporal limitations of Section 9 (e) and the broad authority granted by the First War Powers Act.

## SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that Section 9 (e) of the Trading with the Enemy Act, as amended, is limited in application to seizures made during the first world war.

2. In reversing the judgment of the District Court.

## SUMMARY OF ARGUMENT

Section 9 (e) of the Trading with the Enemy Act unambiguously prohibits payment of unsecured creditors of former owners of vested property if the debts arose after October 6, 1917.

This provision, well adapted to the problems of the first World War confronting Congress at the time of its enactment, appropriately left for future congressional determination the question of restoration of creditors' remedies in the event that the problem should be presented again by the outbreak of another war. Since Congress has not yet granted any remedy assertible against the Custodian by an unsecured creditor of the former owner of property vested during this war, there is no basis upon which the respondent's suit can be maintained.

To construe Section 9 (e) as permitting this suit, in spite of its plain meaning to the contrary, would create economic and administrative anomalies gravely burdening the administration of the alien property controls fashioned for this war. When the original debt claim provisions of the Trading with the Enemy Act were enacted in 1917, the authority to seize alien property extended to the property of enemies and allies of enemies only. Hence, creditors' remedies were correspondingly limited to debts "owing from an enemy or ally of enemy". By the First War Powers Act, 1941, however, the Trading with the Enemy Act was amended to authorize, among other things, the vesting of property of all foreign countries or nationals thereof. By denying all effect to Section 9 (e), the decision below would restore the debt claim provisions of the

original Act, and make them applicable to a situation not contemplated when they were enacted and in which they have no logical place. They would, for example, afford no remedy for creditors of friendly aliens whose property may have been vested for protective or conservatory purposes only, and at the same time they would permit creditors of enemies to interfere with the wartime utilization by the United States of property in this country of enemy origin. This and other anachronistic and discriminatory results of disregarding the plain meaning of Section 9 (e) would defeat a major objective sought by Congress in enacting the First War Powers Act, 1941: complete flexibility in utilizing alien property in the United States for national wartime needs.

During this war unsecured creditors of former owners of vested property have filed claims with the Alien Property Custodian amounting in the aggregate to more than $100,000,000, although the volume of suits brought on such claims has been almost negligible. Nullification of Section 9 (e) by court decision would resolve the question of ultimate disposition of these claims without guidance from Congress, and in advance of congressional action upon war settlements, reparations, and other fundamentally related matters. That a question of such national importance and such complexity is not adequately cognizable in a

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creditor's suit confirms the wisdom of the Congress of 1920 in cutting off remedies for all holders of post-1917 unsecured debt claims until a subsequent Congress, after appropriate deliberation, should prescribe otherwise.

## ARGUMENT

### I

### SECTION 9 (e) OF THE TRADING WITH THE ENEMY ACT, AS AMENDED, IN TERMS PRECLUDES THE MAINTENANCE OF SUIT UPON A DEBT CLAIM ARISING AFTER OCTOBER 6, 1917

Section 9 of the Trading with the Enemy Act, as originally enacted during the first World War, provided, without qualification, that "any person, not an enemy, or ally of enemy * * * to whom any debt may be owing from an enemy, or ally of enemy, whose property * * * shall have been conveyed, transferred * * * delivered, or paid to the alien property custodian" might recover upon his debt in a suit against the Custodian. 40 Stat. 419. By an amendment of June 5, 1920, Section 9 was divided into several subsections. The authority to institute suit upon debt claims was retained as part of Section 9 (a); and Section 9 (e) was added providing in part: "nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917." 41 Stat. 977.[3] In 1928, Section 9 (e) was fur-

[3] The court below asserted (R. 14–15) that the Act "from the first * * * provided that no debt should be paid

ther amended by the addition of a provision that no debt shall "be allowed under this section unless notice of the claim has been filed, or application therefor has been made, prior to the date of the enactment of the Settlement of War Claims Act of 1928." 45 Stat. 271.

We think the terms of Section 9 (e) plainly preclude an interpretation limiting its restrictive effect to claims against former owners of property seized during the last war. Assuming that Section 9 was originally designed to provide a remedy for creditors which, like the remedy of the owner of property mistakenly seized, would arise whenever the Act should be operative in time of war, that purpose was altered by the

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which had not been 'owing' before October 6, 1917." Section 9 of the Act originally provided in part:

"That any person, not an enemy, or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, * * * or to whom any debt may be owing from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, * * * may file with the said custodian a notice of his claim * * *. If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the district court of the United States * * * (to which suit the alien property custodian or the Treasurer of the United States, as the case may be, shall be

amendments embodied in Section 9 (e), and the alteration continues to be effective in the absence of further action by Congress. The limitation with respect to creditors' claims embodied in subsection (e) is cast in language as broad as the language of subsection (a) which grants creditors a remedy. By its terms, Section 9 (e) applies "in any event"; it was not restricted, as it easily might have been, and as other sections of the Act were,[4] to situations growing out of the last war. In our view, there can be no difference in effect

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made a party defendant), to establish the interest, right, title, or debt so claimed. * * *"

The assertion by the court below was apparently based on one of two grounds. The court may have assumed that debts arising after the passage of the Act (October 6, 1917) were unenforceable because they necessarily arose out of prohibited trading with the enemy. This assumption overlooks the provisions authorizing the President to license transactions with the enemy. Or, the court may have assumed that the statutory phrase "may be owing", meant "may be owing at the time of enactment." This assumption overlooks the use of the similar phrase "claiming any interest," in connection with the remedy for return of interests in the seized property itself; it is clear that such claims were not limited to those arising before October 6, 1917.

But even if the court's construction of the original provisions of Section 9 be accepted, it would not impair our position that the express language adopted in the 1920 amendments precludes maintenance of a suit on a debt claim arising at any time after October 6, 1917, and that the effective administration of the statute demands a reading of Section 9 (e) in accordance with its terms.

[4] See, e. g., Section 3 (d) of the original Act: "Whenever, during the present war * * *" 40 Stat. 413.

because Congress, in accordance with the general procedure it adopted at the time, added the disqualifying dates in a separate subdivision instead of incorporating them into Section 9 (a) itself. The conclusion is inescapable that the device employed by Congress effectively deprived the debt claim provision of Section 9 (a) of the continuing vitality it would otherwise have had. Moreover, the fact that Congress failed in 1928, when Section 9 (e) was again the subject of legislative consideration, to limit its future applicability in express terms is further confirmation that no such limitation was intended.

That Congress should have been satisfied to destroy the continuing vitality of the debt claim provisions of the Act is not, as the court below assumed, implausible. Unsecured creditors of former owners of property seized by the United States have no constitutional right to compensation.[5] *Kogler* v. *Miller,* 288 Fed. 806 (C. C. A. 3). See *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491, 497; *Banco Mexicano* v. *Deutsche Bank,* 289 Fed. 924, 928 (App. D. C.), *affirmed,* 263 U. S. 591; *Sutherland* v. *Norris,* 24 F. 2d 414, 415 (C. C. A.

[5] The respondent's suggestion to the contrary (Brief in Opposition, pp. 10–11) is unsupported by the cases. The authorities cited, referring as they do to the protection afforded by the Constitution to persons whose *property* is taken without authority of law, are not relevant to the problem of unsecured creditors of debtors whose assets have been reduced by virtue of vesting by the United States.

3), certiorari denied, 277 U. S. 602; *Synthetic Patents Co.* v. *Sutherland,* 22 F. 2d 491, 494 (C. C. A. 2), certiorari denied, 276 U. S. 630. While their claims are, of course, an appropriate subject for Congressional consideration, the extent to which and the manner in which they should be allowed necessarily pose problems of legislative policy which may be expected to vary from time to time. Not merely the claims of creditors of persons whose property has been vested are involved but also the claims of American owners of property abroad and the more general problem of reparations. It is entirely understandable, therefore, that if Congress at the close of the last war took cognizance at all of the possibility of another conflict, it should have concluded that the question of debt claims as it relates to vested property was one to be faced as the occasion might arise.[6]

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[6] The policies which Congress sought to effectuate do not appear to have been explicitly stated in the hearings, committee reports, or discussions on the floor preceding the enactment of Section 9 (e). See Hearings on H. R. 14208, May, 1920, 66th Cong., 2d Sess.; House Report No. 1089, 66th Cong., 2d Sess. Section 9 (e) itself, however, discloses that Congress made a reasonable disposition of the problems confronting it. The original Act of 1917 had granted rights to pre-1917 creditors, and many such creditors had in fact recovered. See Alien Property Custodian Report (1919), Senate Doc. No. 435, 65th Cong., 3d Sess., pp. 472–482. Hence, if Congress had withdrawn creditors' remedies entirely, it would have made an arbitrary discrimination against those pre-1917 creditors who had either deliberately refrained from perfecting their claims by suit against the

## II

### CONSTRUCTION OF SECTION 9 (e) TO PERMIT SUIT ON UNSECURED DEBTS ARISING AFTER OCTOBER 6, 1917, WOULD MAKE IT IMPOSSIBLE TO ADMINISTER ALIEN PROPERTY CONTROLS IN ACCORDANCE WITH POLICIES WHICH CONGRESS HAS EMBODIED IN THE MOST RECENT AMENDMENTS OF THE TRADING WITH THE ENEMY ACT

Assuming for the purpose of argument that there is sufficient ambiguity in the language of Section (e) to give room for interpretation, we submit that the considerations which should dominate in the process of construction argue convincingly against the interpretation of the court below. For a construction which denies present effectiveness to the limitations of Section 9 (e) would gravely interfere with the efficient administration of alien property controls in accordance with policies laid down by Congress in relation to World War II.

By virtue of amendments to Section 5 (b) of the Trading with the Enemy Act, added by the Joint Resolution of May 7, 1940, and by the First War Powers Act, 1941, the executive branch of the Government is now armed with much more comprehensive power over alien property, with respect both to the range of authorized controls

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United States during the war or who had been unable to assert their claims because of difficulties in communications or other wartime conditions. By preserving a remedy for pre-1917 creditors only, but for all of them, Congress avoided such a discrimination and at the same time saved the question of debt claims in the event of a future war for resolution by a future Congress acting in the light of contemporaneous conditions.

and to the range of foreign interests to which they may be applied, than were granted by the Act as it had developed during the First World War. 54 Stat. 179; 55 Stat. 839. Among other things, Section 5 (b), as amended, authorizes the President "through any agency that he may designate" to "regulate, * * * prevent or prohibit, any * * * transactions involving, any property in which any foreign country or a national thereof has any interest." It also provides that "any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States."

In accordance with these two major grants of power, the administration of the Trading with the Enemy Act during the present war has had two major aspects: the regulation of foreign funds, primarily administered by the Treasury Department; and the vesting of alien property, primarily administered by the Office of Alien Property Custodian. See Executive Order 8389, 5 F. R. 1400, 6 F. R. 2897; Executive Order 9193, 7 F. R. 5205.

The regulatory program was initiated immediately after the invasion by the Axis Powers of Denmark and Norway and soon thereafter was given explicit Congressional ratification in the Joint Resolution of May 7, 1940, *supra*. Essentially, this program, commonly referred to as the "freezing" or "blocking" of foreign funds, has been aimed at the immobilization of foreign assets in the United States by prohibiting any transactions involving them, unless licensed.

Vesting, on the other hand, was not begun until after Pearl Harbor. The essence of the vesting program is the acquisition by the United States of the complete proprietary interest in alien property, rendering it available without restriction for any affirmative use deemed to be in the national interest.

Regulated alien funds in the United States, consisting principally of cash, securities, and other liquid assets, amount in the aggregate to approximately $8,000,000,000;[7] vested property, consisting principally of business enterprises, patents, trade-marks and copyrights, real and personal property, ships, and property in the process of judicial administration, amounts to approximately $212,400,000.[8] In the case of frozen

[7] See Hearings on H. R. 4840, 78th Cong., 2d Sess. (1944), 104–106.

[8] See Annual Report of the Office of Alien Property Custodian (1944), 14, 16. The estimate does not include the value of property vested after June 30, 1944, nor of any

funds, overwhelmingly greater in value than vested property, although ownership by the foreign country or national is not disturbed, the property is not available for the payment of debts contracted for by the owners, except at the discretion of the Treasury Department. If the Treasury refuses to grant a license permitting payment of creditors out of blocked funds, it is beyond dispute that neither the creditor nor the owner has any remedy as a matter of right under the Act. The Office of Alien Property Custodian has operated upon the assumption that creditors of former owners of vested property are in no better position than creditors of owners of blocked assets; that although the Custodian, like the Secretary of the Treasury, has discretionary power to pay creditors in appropriate cases by virtue of his authority under Section 5 (b) to "administer," "liquidate," or "otherwise deal with" vested property in the interest of the United States, he cannot as a matter of law be required to pay debts of former owners of vested property until Congress makes specific provision for their pay-

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vested patents, trade-marks and copyrights. Executive Order 9567, issued on June 8, 1945, articulates the Custodian's authority to vest certain cash, funds, securities, credits, and other property of Germans and Japanese which had previously been subjected to freezing controls only. 10 F. R. 6917. It has been estimated that this source will add approximately $220,000,000 to the aggregate value of vested property. See New York Times, June 10, 1945, p. 10, col. 1.

ment by legislative action addressed to the circumstances of the present war.

The decision below destroys consistency in the position of creditors under the Trading with the Enemy Act. It would permit creditors of certain aliens whose property has been vested to maintain suit for recovery of their debt claims, although the debtor no longer owns the property and although typically the property has been in active wartime use. At the same time, creditors of aliens whose funds are merely frozen have no compulsory means of exacting payment of debt claims, although the frozen property continues to be owned by their debtors and although it is typically intangible and has not been serving any actual productive purpose.

Among creditors of former owners of vested property a further distinction, also without apparent economic justification, would result. If Section 9 (e) were erased by judicial construction in accordance with the decision below, Section 9 (a) would stand without qualification. By its terms, Section 9 (a) permits suits on debt claims only if the debt is one "owing from an enemy or ally of enemy" whose property has been taken. In this war, however, the vesting power has not been limited to the property of "an enemy or ally of enemy"; by the First War Powers Act, 1941, *supra,* it has been extended to the property of

"any foreign country or national thereof." If the former owner of vested property is a non-enemy foreign national, there is nothing in the Act, even as construed by the court below, which authorizes suit against the Custodian by the former owner's creditors. Yet, in the case of property formerly owned by an enemy, where the considerations justifying unrestricted use by the United States are multiplied, the decision below would permit the operations of the Custodian to be burdened by creditors' lawsuits.

Besides resulting in anomalous distinctions among creditors, the decision below would affirmatively encourage creditors who fall within the scope of Section 9 (a) to bring suit immediately. For the judicial decisions in cases growing out of the First World War make it clear that the debt claim provisions of Section 9 (a), taken by themselves, do not establish any equitably ordered priority in the payment of debts out of seized property. The controlling principle is "first come, first served". *United States* v. *Securities Corporation General*, 4 F. 2d 619 (App. D. C.), affirmed *sub nom. White* v. *Mechanics Securities Corp.*, 269 U. S. 283. Hence, the deletion of Section 9 (e) in accordance with the decision below would start a race of diligence to bring suit on debt claims. At the least, this would result both in disorderly administration of vested property

and inevitable inequities among creditors.* Beyond that, it would either impair or terminate entirely the utilization, both in time of war and during the period of postwar adjustment, of valuable economic resources within the United States.

Applied to the present administration of alien property controls, Section 9 (a), without the limitations of Section 9 (e), would make distinctions among creditors on grounds that have no contemporary significance; would burden the operations of the Office of Alien Property Custodian; would encumber or prevent the use of vested property for national purposes; and would produce inequities among the class of creditors permitted to sue. It is plain that Congress anticipated no such results when it amended the Trading with the Enemy Act in 1940 and again in 1941. The statutory history of the First War Powers Act, 1941, abundantly establishes that

* "It would not be meaningful to view the total amount of claims against vested property in juxtaposition with the total amount of property vested in the Custodian. For it must be understood that claims are filed, not against all vested property, but against specific items of vested property. The total amount of the claims against a piece of property frequently exceeds the value of the property. * * * If all debt claims which mention an amount (other than tax claims, secured claims, and irregular claims) were to be allowed in full and the entire value of the property in question devoted to satisfying them * * * a total of $36,887,000 might be realized out of a total of $104,017,000 claimed." Annual Report of the Office of Alien Property Custodian (1944) 139–140.

Congress deliberately granted the power to vest property "of any foreign country or national thereof" in order to assure that such property would be available for any affirmative use that the national interest in time of war might require.[10] Survival of the privilege of satisfying debt claims as a matter of right out of vested property is clearly inconsistent with such an objective. And the explicit grant in Section 5 (b), as amended, of a discretionary power to "administer", or "liquidate" vested property—terms connoting an ordering of creditors' claims on equitable principles—cannot be reconciled with the mandatory "first come, first served" scheme which the cancellation of Section 9 (e) would bring into play.

The inescapable conclusion is that Congress acted upon the assumption that the creditors' remedy provided in Section 9 (a) had been withdrawn by Section 9 (e). Any doubts in the construction of Section 9 (e) should be resolved to support rather than defeat the unmistakably indicated policies of Congress. Actionable rights against the United States must be granted by Congress and, in the absence of the most compelling circumstances, are not to be inferred or extended beyond the terms of the grant. Where,

[10] See, e. g., Senate Report No. 911, 77th Cong., 1st Sess. (1941), 2; House Report No. 1507, 77th Cong., 1st Sess. (1941), 2-3; remarks of Mr. Hancock, 87 Cong. Rec. 9861.

as here, such inference or extension would nullify a dominant policy of a major wartime statute, the strong presumption against departing from a plain congressional direction must prevail. Cf. *United States* v. *Sherwood*, 312 U. S. 584, 590–592.

## III

### THE DECISION BELOW RESOLVES ISSUES OF POLICY WHICH SHOULD AWAIT ACTION BY CONGRESS

Since the outbreak of the present war, 1,411 unsecured creditors of former owners of vested property have filed claims with the Alien Property Custodian in an aggregate amount of $104,017,000.[11] Nevertheless, the number of court actions filed against the Custodian on debt claims has been negligible.[12] We believe that this is attributable to the general prevalence of the view that the Trading with the Enemy Act, as amended, does

[11] Annual Report of the Office of Alien Property Custodian (1944) 138.

[12] From the outbreak of the present war until the filing of the decision below, the following actions (in addition to the instant case) on unsecured debt claims were initiated: *Yasui* v. *Crowley*, Civil Action Nos. 21–451, 21–452, 21–453, S. D. N. Y. (actions voluntarily dismissed, January, 1944); *Hayden* v. *Crowley*, Civil File No. 811, W. D. Wash. (complaint dismissed on other grounds, upon defendant's motion, May, 1944; affirmed on reconsideration, July, 1944); *Hayden* v. *Crowley*, Civil File No. 852, W. D. Wash. (filed, December, 1943; hearing date not yet requested by plaintiff); *Roegelein* v. *Markham*, Civil Action No. 635, W. D. Texas (filed, January, 1945).

not authorize such suits.[13] If the decision below should stand unchanged, a great volume of litigation will inevitably confront the Custodian in the near future.[14]

The decision below resolves judicially questions of war and postwar policy on which Congress has not yet acted. Although the First War Powers Act, 1941, enlarges the affirmative powers of the executive branch in dealing with alien property under Section 5 (b) of the Trading with the Enemy Act, it touches only indirectly and incidentally on the problem of debt claims, by refer-

[13] During the second session of the Seventy-Eighth Congress, a subcommittee of the House Judiciary Committee held extensive hearings upon H. R. 4840 (later amended and reintroduced as H. R. 5031), a bill to amend the First War Powers Act, 1941. See Hearings on H. R. 4840, 78th Cong., 2d Sess (1944). The session expired before final action was taken. The bill specified a detailed procedure for equitable disposition of creditors' claims, but payment was "permissive rather than mandatory on the Custodian." Hearings, 115. The hearings reveal unanimous understanding that under presently existing law, creditors cannot proceed against the Custodian as a matter of right. See, *e. g.*, Statement on Behalf of Special Committee on Custody and Management of Alien Property, American Bar Association, Hearings, 38, 55.

[14] See, e. g., *Stasi* v. *Markham*, Civil Action No. 5196, D. N. J. (filed, April, 1945) in which the plaintiff, who since December, 1942, had held a judgment against the former owner of vested property without bringing suit upon it, initiated action to recover upon his claim a few days after the decision below was rendered. Counsel have agreed to postpone hearing pending final judgment in this case. See also *Lehmann* v. *Markham*, Civil Action No. 32–187, S. D. N. Y. (filed, July, 1945).

ence to administration and liquidation of vested property. We believe, moreover, that the First War Powers Act reveals a Congressional understanding that, for the present, debt claimants cannot proceed against the Custodian as a matter of right. The operations of the Office of Alien Property Custodian have proceeded on the assumption that Congress has deliberately postponed comprehensive consideration of this problem until problems of war settlement and international relations with which it is fundamentally connected can be appropriately dealt with at the same time.[15]

[15] Cf. *United States* v. *Amer. Trucking Ass'ns*, 310 U. S. 534, 549: "The Commission and the Wage and Hour Division, as we have said, have both interpreted § 204 (a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'"

## CONCLUSION

For the reasons stated, the judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

Respectfully submitted,

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OCTOBER 1945.

## APPENDIX

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. 1–31:

SEC. 5 [as amended by Title III of the First War Powers Act, 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App., Supp. IV, 616]:

> (b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,
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> by any person, or with respect to any property, subject to the jurisdiction of the

United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

SEC. 9 (a). That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of

the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the

Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

SEC. 9 (e). No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States * * * nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder; nor shall a debt be allowed under this section unless notice of the claim has been filed, or application therefor has been made, prior to the date of the enactment of the Settlement of War Claims Act of 1928.

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